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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)

MUR 5379

2007 NOV 29 P 2 30

Alex Penelas US Senate Campaign)
and Carlos M Trueba, in his official)
capacity as treasurer)
Miguel B Fernandez¹)
CarePlus Medical Centers, Inc)
CarePlus Health Plans, Inc)
Heriberto Valdes²)

SENSITIVE

GENERAL COUNSEL'S REPORT #3

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¹ During our investigation we learned that Mr Fernandez's legal name is "Miguel" B Fernandez. In his sworn statement in response to the complaint, Mr Fernandez used "Michael" not "Miguel." As such, the reason to believe recommendation in the First General Counsel's Report referred to "Michael" Fernandez. In this report and in all future reports we will use Mr Fernandez's legal name, Miguel B Fernandez, except for quotations in which he is referred to as "Mike" or "Michael."

² Responses to the Commission's reason to believe findings from CarePlus Medical Centers, Inc, CarePlus Health Plans, Inc, Miguel Fernandez, and Heriberto Valdes are attached. The Alex Penelas US Senate Campaign and Carlos M Trueba, in his official capacity as treasurer, did not submit a response to the reason to believe finding.

1	B	CarePlus Medical Centers, Inc and CarePlus Health Plans, Inc	19
2		made and Miguel B Fernandez consented to, corporate contributions	
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4		for Mayor Penelas	
5			
6	C	There is no evidence that the Penelas Committee knowingly	23
7		accepted contributions facilitated by CarePlus Medical Centers, Inc	
8		and CarePlus Health Plans, Inc	
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I. ACTIONS RECOMMENDED

1 Find probable cause to believe that Heriberto Valdes violated 2 U S C § 441b(a)
2 by consenting to facilitating the making of contributions to a candidate for federal
3 office

4

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9
10 3 Find reason to believe that CarePlus Health Plans, Inc violated 2 U S C
11 § 441b(a) by facilitating the making of contributions to a candidate for federal
12 office and by making an expenditure of corporate funds

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14 4

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17
18 5 Approve the attached Factual and Legal Analysis for CarePlus Health Plans, Inc

19 6 Take no further action and close the file with respect to Alex Penelas US Senate
20 Campaign and Carlos M Trueba, in his official capacity as treasurer

21
22 7

II. INTRODUCTION

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27 This matter arose out of a complaint alleging that CarePlus Medical Centers, Inc
28
29 ("CPMC") coerced its employees into making contributions to Miami-Dade County Mayor Alex
30 Penelas' U S Senate campaign committee, Alex Penelas US Senate Campaign ("the Penelas
31 Committee") The Complainant's coercion allegation was based on an e-mail that Heriberto
32 Valdes (Vice President and Chief Operating Officer of CPMC) sent to the administrators of
33 CPMC's patient care centers soliciting contributions to the Penelas Committee The
34 Commission found reason to believe that CPMC violated 2 U S C § 441b(a) by facilitating the
35 making of corporate contributions through coercion and the use of corporate resources, that
36 Miguel B Fernandez (CPMC's President and Chief Executive Officer ("CEO")) and Heriberto
37

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Valdes violated 2 U S C § 441b(a) by consenting to CPMC's facilitating the making of contributions, and that the Penelas Committee violated 2 U S C § 441b(a) by knowingly accepting the prohibited contributions, and authorized an investigation]

The evidence obtained through our investigation confirmed that Valdes used coercion and corporate resources to facilitate the making of corporate contributions. Specifically, in early 2003, Mayor Penelas asked Fernandez for his help in raising funds for his campaign for the U S Senate. Miguel Fernandez Deposition ("Fernandez Dep "), p. 28. Fernandez agreed to help and enlisted the aid of his Vice President, Heriberto Valdes, and his executive assistant, Elizabeth Ricard. We confirmed that Valdes, in his capacity as Vice President of CPMC, sent an e-mail to CPMC employees that solicited contributions to the Penelas Committee, stated that "[a]ll physicians, large vendors and executive level staff will be expected to donate," and asked other CPMC executives to assist with the fundraising. As set forth in the General Counsel's Brief ("GC's Brief") to Valdes, incorporated herein by reference, and as further discussed below, the evidence is sufficient to find probable cause to believe that Valdes violated the Federal Election Campaign Act of 1971, as amended ("the Act").

In addition, the investigation revealed evidence of additional violations not alleged in the complaint concerning Fernandez's use of corporate resources to raise money for Mayor Penelas' campaign and the expenditure of corporate funds in connection with a fundraiser for Mayor Penelas held at Fernandez's home on May 8, 2003. Fernandez used corporate resources, including the services of his executive assistant, in connection with his May 8th fundraiser, which

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1 raised \$81,400 in contributions to the Penelas Committee Specifically, Fernandez directed
2 Ricard to plan, prepare invitations to, and maintain a spreadsheet of pledges and contributions
3 during working hours and to use company equipment and office supplies to accomplish these
4 tasks However, neither Fernandez nor Ricard made advance reimbursements to either CarePlus
5 Health Plans, Inc ("CPHP"), a corporation affiliated with CPMC, or to CPMC, for the fair
6 market value of Ricard's services ⁴ Moreover, for this same fundraiser, CPHP used corporate
7 funds to pay for catering services, in the amount of \$3,325 85, and Fernandez consented to this
8 expenditure ⁵

9 As more fully set forth below, we recommend that the Commission find probable cause
10 to believe Valdes violated 2 U S C § 441b(a) by consenting to CPMC's facilitating the making
11 of contributions to a candidate for federal office _____
12 _____ and find reason to believe that CPHP violated 2 U S C § 441b(a) by facilitating the making
13 of contributions in connection with the May 8th fundraiser and by making an expenditure of
14 corporate funds for that fundraiser _____
15 _____

16 We further recommend that the Commission take no further action and close the file with respect
17 to the Penelas Committee and Carlos M Trueba, in his official capacity as treasurer _____
18 _____

⁴ During the relevant time period, Fernandez was also CEO and Chairman of CPHP Fernandez Dep , p 21 Ricard worked for Fernandez in connection with both CPMC and CPHP Fernandez Dep , pp 25-26

⁵ Fernandez, his wife, and his son subsequently reimbursed CPHP a portion of that expenditure *Infia* Sec III B

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III. DISCUSSION

A. HERIBERTO VALDES USED COERCION AND CORPORATE RESOURCES TO FACILITATE THE MAKING OF CONTRIBUTIONS TO THE PENELAS COMMITTEE.

At the time of the reason to believe findings, there was limited information regarding the circumstances surrounding Valdes' e-mail. As discussed below, evidence obtained during the investigation reveals that Valdes drafted and distributed a coercive e-mail to CPMC employees, then took steps to disguise his actions, including directing Information Technology ("IT") staff to delete that e-mail and drafting another version without the coercive language. However, even though Valdes drafted the e-mail as a solicitation by Fernandez, there is insufficient evidence to show that Fernandez was involved in drafting and distributing either the original e-mail or the substitute.

On March 24, 2003, Valdes sent an e-mail directed to administrators of CPMC's patient care centers.⁶ Rubio Dep., pp. 31, 102, 104, CPMC Response to Complaint, p. 3, CPMC RTB Response, p. 5, Valdes Stmt., ¶¶ 8-11.⁷ The e-mail stated the following:

The following is directed to all physicians and executive level staff at CarePlus Medical Centers Inc. Mr. Michael B. Fernandez, owner and Chief Executive Officer of CarePlus Medical Centers Inc. is asking for your help.

⁶ In his capacity as Vice President of CPMC, Valdes oversaw CPMC's patient care centers and the centers' administrators. See CPMC Objections and Responses to the Commission's Interrogatories and Request for Production of Documents ("CPMC Subpoena Response") (April 30, 2004), Attachment B (Organizational Chart), Eduardo Rubio Deposition ("Rubio Dep."), pp. 24-26. Valdes sent the e-mail message to Jesus Vidueira, one of the administrators of CPMC's patient care centers, and according to Valdes, Vidueira had his permission to forward the message to the other center administrators. Rubio Dep., pp. 31, 102, CPMC Response to Complaint, p. 3, CPMC Reason to Believe Response ("CPMC RTB Response"), p. 5, Heriberto Valdes Statement (September 18, 2003) ("Valdes Stmt."), ¶¶ 8-11. After correcting the spelling of Penelas' name in the e-mail, Vidueira forwarded the message to the other administrators. The version quoted here is Vidueira's corrected version.

⁷ Both Valdes and Rubio state that Valdes sent the e-mail to Vidueira. During the investigation, Vidueira's recollection was unclear as to whether Valdes forwarded the e-mail to him or Rubio first. Jesus Vidueira Declaration (April 7, 2005), ¶ 3 ("Vidueira Declaration"), Vidueira Report of Investigation (July 25, 2005), p. 2 ("Vidueira ROI").

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Alex Penelas, Dade County Mayor and strong supporter of Mike Fernandez and CarePlus Medical Centers is running for United States Senate. He has been working closely with Mr. Mike Fernandez and other community leaders to effect change in the indigent care programs that could represent opportunities for companies like ours to increase revenue while serving our indigent population and providing alternatives other than Jackson Memorial Health Systems.

Mr. Mike Fernandez is asking each of you for a \$1,000.00 campaign contribution for the Alex Penelas for Senate Campaign. The deadline for this contribution is Friday the 28th. He has asked for an accounting of the individuals that donate and those that did not. He will be contacting the individuals that donate to thank you personally. I am sure you are probably wondering why Mike Fernandez does not make the contribution himself. I am sure he would if he could. It would be illegal, as individual maximum allowable contributions are \$2,000.00. As painful as this may seem, it will not be any easier tomorrow so pull out your checkbooks and write the check today to the order of Alex Penelas [sic] for Senate and the check must be dated April 2, 2003 or later.

All physicians, large vendors and executive level staff will be expected to donate. The center administrator has been assigned to collect and submit the contributions to Ed Rubio, Director of Operations.

Complaint Exhibit 4 ("Compl. Ex.") Sometime between March 24 and March 28, 2003, Valdes directed CPMC's Director of Information Technology, William Bounds, to delete the e-mail from CPMC's e-mail server.⁸ See GC's Brief, p. 5, Sherwin Singh Affidavit of July 28, 2006 ("Singh Affidavit") ¶ 3. Valdes provided search criteria, such as the subject line, the date, and the approximate time of the e-mail, to assist in locating and deleting the e-mail, and Bounds, in turn, asked Sherwin Singh, a technician in CPMC's IT office, to handle the actual technical steps

⁸ We were unable to confirm the exact date when Valdes directed that the e-mail be deleted. In his Reply Brief, he stated that it was following press inquiries about the e-mail, which would have been between March 24 and March 29, 2003. On March 30, 2003, the *Miami Herald* published an article that quoted and paraphrased most of Valdes' e-mail, including the statement about who was expected to contribute to the Penelas campaign. See Jim DeFede, *Fundraising Effort Raises Concerns*, THE MIAMI HERALD, March 30, 2003, at 1B. According to the article, reporter Jim DeFede spoke with both Valdes and Fernandez on March 28, 2003 about the e-mail, shortly before the article was published. It appears that Valdes acknowledged to DeFede that the e-mail included a line that some individuals were "expected to donate," but explained that the decision would ultimately be up to the individual. In a subsequent news article, one CPMC employee reportedly told the *Miami Herald*, "To tell me that a list was going to be kept and that we are going to know who did and did not contribute, it was just too much strong-arming for me." Jim DeFede, *Was Helping Hand From Strong Arm?* THE MIAMI HERALD, April 8, 2003, at 1B.

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1 involved in deleting the e-mail See William Bounds Report of Investigation ("Bounds ROI") at
2 1-2, Singh Affidavit ¶¶ 3-4 Using the information provided by Valdes, Singh located and
3 deleted this e-mail from CPMC's e-mail server, and Bounds informed Valdes that the e-mail had
4 been deleted See Singh Affidavit ¶ 5, Bounds ROI at 2, CPMC Subpoena Response, p 13 (July
5 21, 2005)

6 Valdes also created a second version of his e-mail, deleting some of the coercive
7 language

8 The following should be discussed with all physicians and executive level
9 staff at CarePlus Medical Centers Inc Michael B Fernandez, owner and
10 Chief Executive Officer of CarePlus Medical Centers Inc is asking for your
11 help

12
13 Alex Pinelas [sic], Dade County Mayor and supporter of CarePlus Medical
14 Centers is running for United States Senate Mr Mike Fernandez is asking
15 each of you for a \$1,000 00 campaign contribution for the Alex Pinelas [sic]
16 for Senate Campaign The deadline for this contribution is Friday the 28th
17 He has asked for an accounting of the individuals that donate We will be
18 contacting the individuals that donate to thank you personally I am sure
19 you are probably wondering why Mike Fernandez does not make the
20 contribution himself I am sure he would if he could It would be illegal, as
21 individual maximum allowable contributions are \$2,000 00 As painful as
22 this may seem, it will not be any easier tomorrow so pull out your
23 checkbooks and write the check today to the order of Alex Pinelas [sic] for
24 Senate and the check must be dated April 2, 2003 or later

25
26 The center administrator has been assigned to collect and submit the
27 contributions to Ed Rubio, Director of Operations
28

29 CPMC Subpoena Response, at Ex C (May 3, 2004) However, it does not appear that Valdes'
30 second e-mail was ever sent to CPMC's administrators⁹ In his deposition, Rubio, the Director
31 of Operations named in the e-mail, identified the original e-mail as the one Valdes sent out, and

⁹ It appears, however, that Valdes sent the second e-mail to the Penelas Committee after the committee itself received press inquiries about his e-mail Reply Brief, pp 6-7

1 he stated that he had never seen the second version before See Rubio Dep , pp 76-79, 120-23,
2 Rubio Dep Exs 5 and 7

3 After sending the original e-mail, Valdes initiated further discussion at CPMC about
4 fundraising for Mayor Penelas' campaign, and requested other management-level staff under his
5 supervision to assist with the fundraising activities Rubio Dep , pp 43, 60 Eduardo Rubio,
6 who reported directly to Valdes, discussed the Penelas campaign during his mandatory meetings
7 with CPMC patient care center administrators that took place at the company's corporate offices
8 See Rubio Dep , pp 24-26, 31-32, Jesus Vidueira Answers to Questions, ¶ 4 (April 15, 2004)
9 Similarly, Dr Jose Perez (CPMC's Medical Director), who also reported directly to Valdes,
10 discussed the Penelas campaign during at least one of his meetings with the Physicians-In-
11 Charge from each of the patient care centers Dr Jose Perez's Objections and Responses to the
12 Commission's Interrogatories and Request for Production of Documents, (May 3, 2004), p 2,
13 CPMC Subpoena Response (May 3, 2004), Attachment B (Organizational Chart), Dr Jose Perez
14 Statement (May 23, 2005) ("Perez Stmt ") and Attachment ¹⁰

15 According to Jesus Vidueira, Valdes attended some of the administrators' meetings and
16 tried to clarify the message from his e-mail by explaining that Fernandez felt strongly about
17 raising funds for the Penelas campaign, but that ultimately it was each physician's decision
18 whether to contribute Vidueira Declaration, ¶ 5 Nevertheless, Valdes acknowledges that
19 during one administrators' meeting and following four or five other administrators' meetings, he
20 asked the administrators if they would be interested in supporting the Penelas campaign Valdes

¹⁰ Some of the administrators may have handed out copies of Valdes' e-mail to the doctors See Rubio Dep , pp 106-07, see also Dr Manuel Aran Deposition, pp 29-32 ("Aran Dep ") (discussing memo doctors received at one of the medical centers regarding contributions to the Penelas campaign) In addition, an agenda for the Medical Director's meeting of March 27, 2003 with the Physicians-In-Charge lists "Alex Penelas Campaign Fund" as an item on the agenda Perez Stmt and Attachment

1 Stmt , ¶ 7, Valdes' Objections and Responses to the Commission's Interrogatories and Request
2 for Production of Documents ("Valdes Subpoena Response") (May 3, 2004)

3 Ultimately, a number of physicians and administrators contributed to the campaign as a
4 result of Valdes' solicitation, but we were not able to verify how many contribution checks were
5 collected in total Rubio Dep , pp 33-34, CPMC Subpoena Response (May 3, 2004), ¶ 14 In
6 his deposition, Rubio stated that he kept a spreadsheet of all of the contributions as they came in,
7 the administrators periodically informed him if any physicians made contributions However,
8 Rubio states that he deleted the spreadsheet and his copy of Valdes' e-mail message after a news
9 story about the e-mail appeared in the *Miami Herald* Rubio Dep , pp 32-35, 112-15

10 Valdes met with Fernandez on March 31, 2003, the day after the *Miami Herald* article
11 was published, and acknowledged sending an e-mail, but denied authoring the original e-mail,
12 and claimed the revised version was the e-mail that he actually wrote GC's Brief, pp 5-6
13 During the investigation, Valdes submitted a sworn statement to the Commission claiming that
14 the version attached to the complaint "differ[ed] from [his] original e-mail" and must have been
15 altered See Valdes Stmt , ¶ 12 (September 18, 2003 and amendment of May 3, 2004), see also
16 Valdes' Subpoena Response (May 3, 2004) He omitted, however, the material fact that he
17 directed IT staff to delete his original e-mail from CPMC's e-mail server in March 2003, and he
18 repeated these statements in subsequent responses See GC's Brief, p 4, see also Bounds ROI at
19 1-2, Singh Affidavit ¶¶ 3-4 Valdes, however, no longer disputes that he sent the original e-mail
20 message to CPMC employees soliciting contributions for the Penelas Committee, and he now
21 admits to directing staff to delete the original e-mail Reply Brief at 13-14

22 After the *Miami Herald* article was published, Fernandez retained a law firm with
23 experience in campaign finance law who quickly drafted an e-mail for Fernandez, which he sent

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1 to the CPMC administrators on April 1, 2003, directing CPMC administrators to return all of the
2 checks collected as a result of Valdes' e-mail Fernandez Dep , pp 105-07, Fernandez Dep Exs
3 8 and 9, p 3 The April 1, 2003 e-mail stated, in pertinent part

4 I understand that while I was out of town last week an email was sent requesting
5 contributions to Mayor Penelas' expected campaign for the U S Senate I did not
6 authorize that email, accordingly please disregard it in its entirety I have directed
7 that any contributions received as a result of that email be returned I intend to
8 hold a fundraiser for Mayor Penelas at some point Anyone interested may
9 contribute at that time, but that is purely a personal decision for each individual to
10 make You may refuse to contribute without reprisal and contributions to Penelas
11 for Senate or any other candidate committee are strictly voluntary
12

13 Fernandez Dep Ex 8 Rubio, who had collected the contribution checks derived from Valdes'
14 original e-mail (but had not yet forwarded them to the Penelas Committee), returned the
15 contribution checks to the administrators and instructed them to return the checks to the doctors
16 See Rubio Dep , pp 34, 125-26 See also Fernandez Dep , pp 110, 113, Aran Dep , p 49,
17 Elizabeth Ricard Deposition ("Ricard Dep "), pp 73-89, Jim DeFede, *Was helping hand from*
18 *strong arm?*, THE MIAMI HERALD, April 8, 2003, at 1 (reporting that contributions had been
19 returned) ¹¹

20 **1. There is probable cause to believe that Heriberto Valdes violated**
21 **2 U.S.C. § 441b(a).**
22

23 Under the Act, corporations are prohibited from making contributions or expenditures in
24 connection with any election for Federal office, and corporate officers are prohibited from
25 consenting to such contributions or expenditures 2 U S C § 441b(a) While the Act permits a
26 corporation and its officers to make partisan communications to its stockholders and executive or

¹¹ After the March 30, 2003 *Miami Herald* article, Fernandez cancelled the fundraiser he planned to hold for Penelas in April 2003 Fernandez Dep Ex 9, p 2 However, once Fernandez announced that he was going to hold a fundraiser for Mayor Penelas on May 8, 2003, Rubio, without instruction from Fernandez, told CPMC's administrators to go back to the doctors who contributed the first time and ask them if they wanted to contribute again Rubio Dep , pp 34-37 See *infra* Section III B

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1 administrative personnel and their families, 2 U S C § 441b(b)(2)(A), if the activity goes beyond
2 communication to "facilitating the making of a contribution," other than to the separate
3 segregated fund of the corporation, it becomes a prohibited contribution by the corporation

4 11 C F R § 114 2(f)(1) The Commission's regulations define "facilitation" as "using corporate
5 resources or facilities to engage in fundraising activities in connection with any federal

6 election ¹² *Id* The regulations also provide a non-exhaustive list of examples of corporate

7 facilitation One example of facilitating the making of contributions includes corporate officers

8 directing subordinates or support staff to assist in the fundraising as part of their work

9 responsibilities using corporate resources, unless the corporation receives advance payment for

10 the fair market value of such services 11 C F R § 114 2(f)(2)(i) Another example of corporate

11 facilitation is using coercion, such as the threat of a detrimental job action, the threat of any other

12 financial reprisal, or the threat of force, to urge any individual to make a contribution or engage

13 in fundraising activities on behalf of a candidate or political committee 11 C F R

14 § 114 2(f)(2)(iv)

15 Valdes facilitated the making of contributions by soliciting contributions to the Penelas

16 Committee through the use of coercion In his Reply Brief, Valdes argues that his original

17 e-mail did not actually coerce any employees to contribute to the Penelas Committee Reply

18 Brief, pp 10-12 Valdes refers to statements that Eduardo Rubio made during his deposition that

19 he did not "remember there being reluctance" among employees about making the contributions

20 and Fernandez's statement in his deposition that no employee was ever retaliated against for not

¹² Exceptions to the general prohibition against corporate facilitation of contributions include soliciting contributions to be sent directly to candidates if the solicitation is directed to the corporation's restricted class and forwarded by the corporation's separate segregated fund in accordance with 11 C F R § 110 6 11 C F R § 114 2(f)(3) and (4)

1 contributing, to support his argument ¹³ *Id* Indeed, along with its response to the reason to
2 believe findings, CPMC submitted a number of sworn statements from doctors and other
3 employees stating that they had contributed to the Penelas Committee voluntarily ¹⁴

4 However, Valdes' original e-mail made clear that recipients were "expected" to
5 contribute to the Penelas Committee, set a deadline for the contributions, urged recipients that
6 "[a]s painful as this may seem, it will not be any easier tomorrow," and stated that Fernandez, the
7 President and CEO of CPMC, planned to monitor who contributed and who did not *See supra*
8 p 7 No contribution received in response to a solicitation with language like this could be
9 considered voluntary Recipients would have had to conclude that they were not being given
10 much of a choice, regardless of whether they were pre-disposed to support the Penelas campaign
11 *See, e g* , MUR 5337 (First Consumers National Bank)(finding reason to believe that Bank's
12 solicitations for contributions used coercion and implied threats of financial reprisal and
13 detrimental job action despite stating that the contributions were "voluntary" where the names of
14 those who did not contribute were disclosed to bank employees) *Cf* MUR 4780 (Harris)
15 (finding no reason to believe facilitation took place and no coercion, in part because the
16 employer kept no records and made no inquiries regarding who contributed)

¹³ During his deposition, Rubio explained that he "personally didn't see a sense of reluctance" among the physicians and that "[a] lot of people were buying into it" Rubio Dep , pp 88-89 However, it appears that while Rubio had direct contact with the patient care center administrators as part of his duties at CPMC, he did not have direct contact with the physicians

¹⁴ Although the contributions collected as a result of Valdes' solicitation were never forwarded to the Penelas Committee, facilitation took place because Valdes used coercion as part of his solicitation 11 C F R § 114.2(f)(2)(iv) Whether the committee received the contributions is irrelevant to the facilitation analysis, the focus of the facilitation regulation is on the prohibited activity of a corporation, specifically how the corporation solicited or collected the contributions, not whether the contributions were actually delivered to the committee *See id* (setting forth the use of coercion to urge any individual to make a contribution as an example of facilitation), *see also* 11 C F R § 114.1(f) (explaining that "method of facilitating the making of contributions" means the manner in which the contributions are received or collected by the solicitor)

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1 Although Fernandez claimed that the company did not retaliate against anyone who did
2 not contribute, it is sufficient that Valdes' e-mail used the threat of detrimental job action or
3 other financial reprisal, to urge physicians and administrators to make a contribution or engage in
4 fundraising activities on behalf of Penelas See 11 C F R § 114.2(f)(2)(iv) The threat does not
5 actually need to result in a negative action Id See also MUR 5337 (First Consumers National
6 Bank) (finding solicitation was coercive even though there was no evidence that adverse
7 employment actions were taken against employees who did not contribute in response to the
8 bank's solicitation)

9 The question of whether Valdes' actions were in knowing and willful violation of the law
10 is less straightforward On the one hand, Valdes' attempts to disguise his original e-mail by
11 preparing a shorter, different version of the e-mail, which did not include some of the coercive
12 language, and then denying authorship of the original e-mail and instructing a subordinate to
13 delete it from the corporation's e-mail server could be consistent with actions that were knowing
14 and willful The knowing and willful standard requires knowledge that one is violating the law
15 See 122 Cong Rec H3778 (daily ed May 3, 1976) An inference of knowing and willful
16 conduct may be drawn "from the defendant's elaborate scheme for disguising" his or her actions
17 *United States v Hopkins*, 916 F 2d 207, 214-15 (5th Cir 1990) The evidence need not show
18 that the defendant "had specific knowledge of the regulations" or "conclusively demonstrate" a
19 defendant's "state of mind," if there were "facts and circumstances from which the jury
20 reasonably could infer that [the defendant] knew her conduct was unauthorized and illegal " Id
21 at 213 (quoting *United States v Bordelon*, 871 F 2d 491, 494 (5th Cir), cert denied, 493 U S
22 838 (1989))

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1 Valdes was given numerous opportunities to confront the evidence before the
2 Commission and explain why he directed the original e-mail be deleted and prepared a second
3 version ¹⁵ He chose not to do so, however, and omitted material information in sworn statements
4 to the Commission and ultimately asserted his Fifth Amendment right against self-incrimination
5 in response to the Commission's deposition subpoena See Valdes Affidavit (July 8, 2005) In
6 his affidavit, Valdes asserted he would refuse to answer questions about his communications
7 with CPMC employees regarding raising funds for Penelas' campaign, his e-mail of March 24,
8 2003 and any other version of his e-mail, and the deletion of the e-mail *Id* at ¶ 3 Valdes'
9 refusal to testify as to the circumstances surrounding the making of his e-mail solicitation and the
10 evidence that Valdes deliberately attempted to conceal his actions could support the inference
11 that he knew his conduct was illegal See *Baxter v Palmigiano*, 425 U S 308, 318 (1976) ("the
12 Fifth Amendment does not forbid adverse inferences against parties to civil actions when they
13 refuse to testify in response to probative evidence offered against them"), *SEC v*
14 *International Loan Network, Inc*, 770 F Supp 678, 695-96 (D D C 1991), *aff'd*, 968 F 2d 1304
15 (D C Cir 1992) (adverse inference drawn from defendants' assertion of their Fifth Amendment
16 right not to testify during depositions), *Pagel, Inc v SEC*, 803 F 2d 942, 946-47 (8th Cir 1986)
17 (agency did not err in taking into account adverse inference based on broker-dealer's invocation
18 of Fifth Amendment privilege against self-incrimination), *Cerrone v Shalala*, 3 F Supp 2d
19 1174, 1175 n 3, 1180 (D Colo 1998) (agency's finding, based in part on adverse inference
20 drawn against disability benefit recipient who invoked the Fifth Amendment, was supported by
21 substantial evidence) Arguably, the only way that Valdes could incriminate himself in

¹⁵ Valdes had numerous opportunities to acknowledge and explain his conduct – in CPMC's response to the complaint, in his response to the reason to believe finding, in response to compulsory discovery requests, in his sworn written statements, or when he was subpoenaed for deposition

1 testimony to the Commission regarding his original e-mail solicitation would be if in sending the
2 coercive e-mail to his subordinates at CPMC, Valdes did so intentionally and knowing that it was
3 against the law

4 On the other hand, after failing and refusing to fully respond to the Commission's
5 discovery and submit to a deposition, Valdes' asserts for the first time in his Reply Brief that he
6 attempted to disguise his actions not because he knew he had violated the law, but because a
7 reporter had asked him questions about the connection between the fundraising effort and alleged
8 benefits received by CMPC, which led Valdes to be concerned about embarrassing his boss
9 Reply Brief, pp 14-15 Unsworn statements made through counsel at this late stage, without the
10 opportunity for cross-examination, should not be given great weight, particularly given previous
11 refusals by Valdes to cooperate with the investigation and submit to a deposition and Valdes'
12 previous representations to the Commission that have proven untrue or misleading *Supra* at 10
13 Nevertheless, while it appears clear that Valdes took steps to conceal his actions a few days after
14 the original e-mail, which could be consistent with someone who had knowledge at the time he
15 sent the original e-mail that the coercive solicitation was prohibited by law, his actions could also
16 be consistent with someone who did not know his actions were prohibited by law at the time he
17 sent the e-mail and only attempted to disguise his actions in panic after a reporter called his
18 e-mail into question

19 In addition, there is no evidence that Valdes was experienced in campaign finance
20 matters, and, to the contrary, he claims that this was his first experience Reply Brief, p 2
21 While his reference in the e-mail to the \$2,000 contribution limit suggests he had some
22 knowledge of the applicable law, it does not necessarily follow that he had ever been made
23 aware of the Commission's facilitation regulation Valdes could successfully argue in court that

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1 he learned about the \$2,000 limit from Fernandez and that his reference to it in the e-mail shows
2 an attempt at compliance. Moreover, while he removed some of the coercive language when he
3 prepared the revised e-mail, he left some of the language alone (e.g., reference to the April 28th
4 deadline and the statement that "as painful as this may seem, it will not be any easier
5 tomorrow"), and his changes overall appear to mirror the sentences called into question by the
6 reporter.

7 Because there do not appear to have been contemporaneous attempts by Valdes to
8 disguise his original e-mail, and because there appears to have been a plausible intervening
9 event, post hoc concealment, and no independent evidence of his knowledge at the time of the
10 original e-mail upon which to rely on the adverse inference rule, we do not recommend that the
11 Commission make knowing and willful findings as to Valdes. Accordingly, we recommend that
12 the Commission find probable cause to believe that Valdes violated 2 U.S.C. § 441b(a) by
13 consenting to facilitating the making of contributions. We also recommend the Commission
14 authorize entering into probable cause conciliation with Valdes. *See infra* Section IV.

15 **2. Based on Heriberto Valdes' e-mail, CarePlus Medical Centers, Inc. violated**
16 **2 U.S.C. § 441b(a).**
17

18 The Commission previously found reason to believe that CPMC violated 2 U.S.C.
19 § 441b(a) by facilitating the making of contributions to a candidate for federal office in
20 connection with Valdes' e-mail. Based on the actions of Valdes, and the principle that a
21 corporation may be held liable for the actions of its officers while acting within the scope of their
22 employment, there is sufficient evidence that CPMC violated 2 U.S.C. § 441b(a).

23 Valdes was the Vice President of CPMC at the time Fernandez asked him to solicit
24 contributions from the "Medical Center folks." Fernandez Dep., pp. 30-31. As such, Valdes was
25 acting within the course and scope of his employment as CPMC's Vice President when he sent

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1 his coercive e-mail to the CPMC administrators A corporation can only act through its agents,
2 officers, and directors See *U S v Wallach*, 935 F 2d 445, 462 (2d Cir 1991), William Meade
3 Fletcher et al , Fletcher Cyclopedia of the Law of Private Corporations § 30 (Supp 2004)
4 Moreover, corporations may be held liable for the acts of an employee within the scope of the
5 employment and that benefit the corporate employer See, e g , *Liquid Air Corp v Rogers*, 834
6 F 2d 1297, 1306 (7th Cir 1987) In enforcement matters, the Commission has held corporations
7 liable for the actions of their officers See, e g , MURs 4931 (Audiovox Corp), 5366 (Turner
8 and Associates), and 5666 (MZM, Inc) See also MUR 5268 (Kentucky State District Council
9 of Carpenters)(finding union liable for the acts of its officers)

10 Because Valdes solicited support for the Penelas campaign at the direction of Fernandez,
11 his boss, and based on the statements made in his e-mail that Penelas was a supporter of CPMC,
12 *supra* p 7, Valdes was acting within the course and scope of his employment as an officer of
13 CPMC and to benefit CPMC when he made his coercive solicitation for contributions from
14 CPMC employees Thus, CPMC can be held liable for Valdes' actions

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18 **3 There is no evidence that Miguel B. Fernandez violated 2 U.S.C § 441b(a) in**
19 **connection with Heriberto Valdes' e-mail.**
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21 The evidence does not support findings with respect to Fernandez's role in raising funds
22 from CPMC employees for Mayor Penelas' campaign through Valdes' e-mail According to
23 Fernandez, while he asked Valdes to solicit contributions to the Penelas campaign, he did not
24 authorize Valdes' e-mail and, in fact, he did not learn about the e-mail until Jim DeFede, the
25 *Mianu Herald* reporter, asked him about it Fernandez Dep , pp 60-61 Valdes also states that

1 he did not discuss with, or ask, Fernandez to approve, the e-mail to CPMC administrators prior
2 to sending it out ¹⁶ Valdes Stmt , ¶ 14 (May 3, 2004) The investigation did not uncover any
3 evidence suggesting otherwise Based on the investigation, we do not recommend any further
4 action as to Fernandez with regard to the March 24 solicitation

5 **B. CAREPLUS MEDICAL CENTERS, INC. AND CAREPLUS HEALTH**
6 **PLANS, INC. MADE, AND MIGUEL B. FERNANDEZ CONSENTED TO,**
7 **CORPORATE CONTRIBUTIONS AND EXPENDITURES IN CONNECTION**
8 **WITH MIGUEL B. FERNANDEZ'S MAY 8TH FUNDRAISER FOR MAYOR**
9 **PENELAS.**

10
11 Under the Act, CPMC and CPHP were prohibited from making, and corporate officers
12 are prohibited from consenting to the making of, corporate contributions or expenditures in
13 connection with any election to any political office 2 U S C § 441b(a) This prohibition
14 includes corporate officials ordering or directing subordinates or support staff to plan, organize
15 or carry out a fundraising project as part of their work responsibilities using corporate resources,
16 unless the corporation receives advance payment for the fair market value of such services ¹⁷
17 11 C F R § 114 2(f)(2)(i)(A) The evidence gathered during the investigation demonstrates that
18 CPMC, CPHP, and Fernandez used the services of Fernandez's Executive Assistant, Elizabeth
19 Ricard, and other corporate resources to facilitate the making of contributions to Mayor Penelas'
20 campaign in connection with a fundraiser Fernandez held at his home on May 8, 2003, which
21 raised \$81,400 for the campaign

¹⁶ In a memorandum Fernandez directed to Valdes, Fernandez stated, "I would like to count on you for \$30,000 " Ricard Dep Ex 12, Fernandez Dep Ex 15 According to Fernandez, he wanted Valdes to get the contributions from the "Medical Center folks " Fernandez Dep , pp 30-31 Although Fernandez and Valdes discussed the \$30,000 "target" (*id* , at 52-53), Valdes did not tell Fernandez what he intended to say to CPMC employees about making contributions to Mayor Penelas' campaign *Id* , at 103 There is no evidence that Fernandez consented to the use of coercion, which was the manner used to facilitate contributions in this matter

¹⁷ Corporate employees may make occasional, isolated or incidental use of corporate facilities for their own individual volunteer activities in connection with a Federal election provided that such activity does not exceed one hour per week or four hours per month and the corporation is reimbursed for certain costs incurred by such activity 11 C F R § 114 9(a)

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1 In late February 2003, Fernandez directed Ricard to perform several tasks during working
2 hours, using company equipment and office supplies, in connection with a fundraiser Fernandez
3 was planning to hold for Mayor Penelas in April 2003 Ricard Dep , pp 31-35, 77-78 At
4 Fernandez's direction, Ricard typed and sent a memorandum from Fernandez to 10 CPMC and
5 CPHP executives, vendors, and family members soliciting campaign contributions for Mayor
6 Penelas' campaign ¹⁸ *Id* at 77-118, Ricard Dep Ex's 8-17 In addition, Ricard prepared the
7 invitation for Fernandez's fundraiser (Ricard Dep , pp 60-66, Ricard Dep Ex 5), she prepared
8 spreadsheets of the contributions pledged and received (Ricard Dep , pp at 152-56, Ricard Dep
9 Ex's 21-22), and she typed letters and address labels for the invitations to Fernandez's
10 fundraiser Ricard Dep pp 189-97, Ricard Dep Ex's 28-30 Neither Ricard nor Fernandez
11 reimbursed CPMC or CPHP for Ricard's services or the use of company equipment and office
12 supplies Ricard Dep , pp 36

13 Ricard performed all of the tasks discussed above during working hours ¹⁹ However,
14 neither CPMC nor CPHP received advance payment for the fair market value of Ricard's
15 services from Fernandez or the Penelas Committee 11 C F R § 114.2(f)(2)(i)(A) See CPMC
16 Letter dated January 18, 2006 Further, Ricard did not volunteer to work for Mayor Penelas'
17 campaign, rather, Ricard performed the fundraising tasks because Fernandez directed her to do
18 so as his administrative assistant Ricard Dep , pp 33-34, 77, 218 Although Ricard did not
19 keep any records documenting the amount of time she spent on fundraising (Ricard Dep , pp 36-
20 37), given the amount of work she did in connection with Fernandez's fundraiser, she

¹⁸ Fernandez expected "to have law firms and other folks that [he did] business with, both personally and corporately, help [him] collect some checks" for Mayor Penelas' campaign Fernandez Dep , p 32

¹⁹ It also appears that Rubio collected some of the contributions for the May 8th fundraiser on CPMC premises Rubio Dep , p 35-37 However, as discussed *supra*, Rubio collected those contributions on his own accord In addition, statements provided by some of the CPMC contributors reveal that many contributors made their contributions directly to campaign staff at the May 8th fundraising event See e.g. Dr. Teresita Hernandez ROI, p 3

1 undoubtedly exceeded the four-hour per month limit for volunteer activity *See* 11 C F R
2 § 114.9(a)(iii). For example, Ricard recalls spending a "few" hours just on the invitation to the
3 fundraiser and about three hours on several memoranda in connection with Fernandez's
4 fundraiser. Ricard Dep., pp. 65-124.

5 In addition, it appears that CPHP used corporate funds to pay for the catering services
6 provided at Fernandez's May 8th fundraiser for Mayor Penelas. CPHP sent one check to Pepe
7 Luzarraga Catering Corp. ("Pepe Luzarraga") in payment for the costs of both Fernandez's
8 May 8th fundraiser for Penelas and for a separate corporate event also held at Fernandez's home.
9 Fernandez Dep., pp. 183-86; Fernandez Dep. Ex's 22, 23. Fernandez acknowledges that he saw
10 the May 12, 2003 invoice from Pepe Luzarraga in the amount of \$3,325.85 to CPHP and signed
11 off on it, but claims that it was mistakenly sent to CPHP's finance office along with the other
12 invoice. According to Fernandez, a different procedure should have been followed for the
13 invoice for his fundraiser. Fernandez Dep., pp. 183-85. Fernandez claims that he first learned
14 that CPHP paid for the catering services provided at his fundraiser when, more than a year later,
15 he responded to the Commission's discovery requests in this matter. *Id.* at 186-87. After
16 discovering that CPHP paid for those catering services, Fernandez, his wife, and his son each
17 reimbursed CPHP \$1,000 for their respective shares of the catering services and the Penelas
18 Committee reimbursed CPHP \$325.85 for the remainder.²⁰ *Id.*

19 Since Ricard performed work on Fernandez's fundraiser for Penelas in her capacity as
20 Fernandez's executive assistant, both CPHP and CPMC are liable for Fernandez's use of
21 Ricard's services and corporate resources in connection with the May 8, 2003 fundraiser. In

²⁰ Because the fundraiser was held at Fernandez's home, which he shares with his wife and his son, Fernandez, his wife, and his son were each entitled to provide up to \$1,000 in food and beverages for the fundraiser. *See* 11 C F R § 100.77.

1 addition, Fernandez consented to CPHP's expenditure of corporate funds for the Penelas
2 campaign. Therefore, we recommend that the Commission find reason to believe that CPHP
3 violated 2 U S C § 441b(a) by facilitating the making of contributions to the Penelas' campaign
4 and by making an expenditure of corporate funds in connection with Fernandez's fundraiser for
5 Mayor Penelas.²¹

6 The investigation, however, has not established that Fernandez knew that using corporate
7 resources to raise campaign funds was a violation of the law. Fernandez maintains that it never
8 occurred to him that involving employees in raising campaign contributions violated Federal
9 campaign finance laws or that there was anything wrong with using a fax machine or using a
10 conference room to help out a candidate. Fernandez Dep., pp. 36-37. He states that he never
11 asked his attorneys, who he retained after the *Miami Herald* exposed Valdes' e-mail, specifically
12 whether the use of company staff and resources was permissible under the law. Miguel
13 Fernandez Affidavit of November 14, 2006 ("Fernandez Affidavit"), pp. 2-3.²² As a result, he
14 continued to use Ricard's services and company resources to carry out his May 8th fundraiser for
15 Penelas.

16 Although Fernandez consulted with the Penelas Committee regarding general fundraising
17 guidelines once he agreed to raise funds for the campaign, we have not been able to confirm that
18 those guidelines covered the use of corporate resources, and Fernandez denies that they did.

²¹ As discussed *supra*, the Commission has already found reason to believe that Fernandez and CPMC violated 2 U S C § 441b(a).

²² Fernandez retained counsel with experience in federal campaign finance law, "to ensure that I and my executives understood federal campaign finance laws and to address any concerns that may have arisen because of the DeFede article," and expected counsel "to brief our executives, provide handouts, and review and approve invitations and procedures for [his] May [2003] fundraiser and any future fundraising activity." Fernandez Dep., pp. 105-07, Fernandez Dep. Ex. 9, p. 3. However, Fernandez admits that he only attended the beginning of the training session the attorneys held for the company executives and does not know whether the issue of using company staff, facilities, or resources was discussed during the session. Fernandez Dep., pp. 111-12, Fernandez Affidavit, p. 2.

1 Fernandez Dep , pp 37-35, 49-51 Similarly, even though CPHP's employee handbook in effect
2 in 2003 stated that all political activities "must be conducted on the [employee's] own time and
3 outside company property," Fernandez avers that he was not aware of the existence of the
4 handbook until he was asked about it during the investigation of this matter *Id* at pp 127-29,
5 Fernandez Dep Ex 10, Fernandez Affidavit, ¶ 3 The investigation revealed no evidence
6 suggesting otherwise Thus, there is insufficient information upon which to infer that Fernandez
7 used corporate resources in knowing and willful violation of the law

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10 **C. THERE IS NO EVIDENCE THAT THE PENELAS COMMITTEE**
11 **KNOWINGLY ACCEPTED CONTRIBUTIONS FACILITATED BY**
12 **CAREPLUS MEDICAL CENTERS, INC. OR CAREPLUS HEALTH**
13 **PLANS, INC.**

14 The Commission's reason to believe finding with respect to the Penelas Committee was
15 based on its alleged knowing acceptance of illegally solicited and bundled contributions from
16 CPMC employees See 2 U S C § 441b(a), 11 C F R § 103 3(b) However, the contributions
17 that were collected from CPMC employees in response to Valdes' e-mail were never forwarded
18 to the Committee, moreover, evidence obtained during the investigation demonstrates that the
19 Penelas Committee did not know about Valdes' coercive e-mail before it was sent and that once
20 the Penelas Committee learned about it, the committee asked Fernandez to return the

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1 contributions collected as a result of the e-mail²³ See Fred Menachem's Response to Subpoena
2 to Produce Documents, ¶ 1

3 The evidence does not establish that the Penelas Committee knew that the contributions
4 collected at Fernandez's May 8, 2003 fundraiser were facilitated by CPMC or CPHP Prior to
5 the fundraiser, the Penelas Committee had limited contact with Fernandez and Ricard, and those
6 contacts pertained to the fundraising guidelines Fernandez obtained from Fred Menachem, the
7 date scheduled for the fundraiser, and details regarding the invitation for the fundraiser See
8 Fernandez Dep , pp 37-38, 49-50, Ricard Dep , pp 60-63, 143-45

9 Thus, because the Penelas Committee did not receive or accept any of the contributions
10 generated by Valdes' coercive e-mail, and since the evidence does not suggest that the Penelas
11 Committee knew that corporate resources were used to help finance Fernandez's fundraiser, it
12 does not appear that the Penelas Committee knowingly accepted contributions that were
13 facilitated by CPMC or CPHP Therefore, we recommend that the Commission take no further
14 action with respect to Alex Penelas US Senate Campaign and Carlos M Trueba, in his official
15 capacity as treasurer, and close the file as to these two respondents

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²³ More specifically, Mayor Penelas' campaign learned about Valdes' e-mail on March 29, 2003, when Jim DeFede contacted Mayor Penelas' Chief of Staff, Javier Soto, to get his response to Valdes' e-mail See Penelas Committee's Response to the Commission's Subpoena to Produce Documents and Order to Submit Written Answers, p 1 After the *Miami Herald* published DeFede's article regarding the e-mail, Mayor Penelas and Fred Menachem (the finance director of Mayor Penelas' campaign) each spoke to Fernandez, who agreed that any money collected as a result of the e-mail should be returned to the contributors *Id* As discussed *supra*, Rubio confirms that after the *Miami Herald* story was published, he and the center administrators returned the contributions, having never forwarded them to the Penelas Committee Rubio Dep , p 34

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V RECOMMENDATIONS

**1 Find probable cause to believe that Heriberto Valdes violated 2 U S C § 441b(a) by
consenting to facilitating the making of contributions to a candidate for federal office**

2 _____

**3 Find reason to believe that CarePlus Health Plans, Inc violated 2 U S C § 441b(a)
by facilitating the making of contributions to a candidate for federal office and by
making an expenditure of corporate funds**

4 _____

5 Approve the attached Factual and Legal Analysis for CarePlus Health Plans, Inc

**6 Take no further action and close the file with respect to Alex Penelas US Senate
Campaign and Carlos M Trueba, in his official capacity as treasurer**

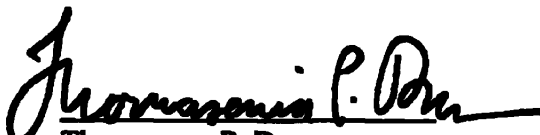
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8 Approve the appropriate letters

Date

11/29/2007


Thomasenia P. Duncan
General Counsel


Ann Marie Terzaken
Associate General Counsel
for Enforcement


Cynthia E. Tompkins
Assistant General Counsel


Ana J. Peña-Wallace
Attorney

Other Staff Assigned Jack Gould
Wade Sovonick

Attachments

1

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Factual and Legal Analysis for CPHP

Reason to Believe Responses (Fernandez, CPMC, and Valdes)